

Opinions

# Trump's legal case for executive privilege is strained at best

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By Harry Litman

As part of the most comprehensive stonewalling of Congress since at least Watergate, the [White House is blocking](#) the House Judiciary Committee from obtaining documents it had subpoenaed from former White House counsel Donald McGahn.

At this point, the White House hasn't expressly asserted executive privilege over the McGahn documents. But once McGahn made it clear he would not comply with this subpoena to "maintain the status quo" in a dispute between equal branches of government, the bottom-line result was the same: If Congress wants the documents, it will have to negotiate terms with the White House or go to court.

These maneuvers are preparatory to a bigger fight over whether the White House will be able to prevent McGahn from testifying to Congress, and the stakes in this fight about as high as they come. McGahn met with special counsel Robert S. Mueller III's team for some 30 hours, during which he provided some of the most damaging testimony of any witness in the probe.

Critically, McGahn told Mueller that Trump [on multiple occasions](#) directed him to [fire the special counsel](#), including by ginning up a fanciful claim that Mueller had a conflict of interest. Trump thereafter directed McGahn to lie about Trump's campaign and to write a letter falsely asserting that Trump had not directed him to fire the special counsel, Mueller's report said.

McGahn's testimony also helped establish another obstruction offense: Trump's instructing his former campaign manager, Corey Lewandowski, by then a private citizen, to tell then-Attorney General Jeff Sessions to limit Mueller's probe to future elections.

What this all means is that McGahn is already locked into an account of Trump's conduct that appears to amount to multiple felonies for obstruction of justice. Detailing that conduct in a congressional hearing would provide a moment of drama akin to John Dean's Watergate testimony. And it is that sort of drama that seems to be the Democrats' only hope for putting impeachment into serious play.

No wonder, then, that the White House seems frantic to try to stifle McGahn. Both Attorney General William P. Barr and Trump lawyer Emmet Flood have telegraphed that the White House may attempt to invoke executive privilege to prevent McGahn's testimony.

But the legal case for executive privilege is strained at best.

The animating idea for executive privilege is that the president needs confidential, candid advice to discharge his responsibilities. As a consequence, the president enjoys a constitutionally anchored privilege to bar the disclosure of communications related to the need for that kind of advice.

To date, the Trump administration has tried to play it cute in its dealings with Congress. Witnesses such as Director of National Intelligence Daniel Coats and former chief strategist Stephen K. Bannon have declined to answer Congress's questions by stating that they were protecting the president's prerogative to assert executive privilege — but without Trump's having actually done so.

That won't work for McGahn. In his case, Congress will insist that Trump actually invoke executive privilege, serving up the issue for judicial resolution.

And under prior Office of Legal Counsel memorandums from 1982 and 1989 — the latter, in fact, written by Barr, then-assistant attorney general — and related practices, invoking the privilege requires multiple steps by the executive branch, beginning with good-faith negotiations with Congress.

Assuming negotiations fail, the department is required — by its own playbook — to make several determinations that will be challenging in the case of McGahn. Two are of special import here.

First, the department needs to conclude that executive privilege has not already been waived. Both Barr and Flood have been laying the groundwork for that assertion, but that's going to be quite a stretch. Arguably, McGahn's interviews with Mueller did not constitute waiver, because they took place within the executive branch. But the subsequent transmission of the report to Congress, with an express declination to assert executive privilege, seems plainly to amount to a waiver of at least the substance of the material in the report. The president's after-the-fact protective assertion of privilege over the report Wednesday — on the ground that there is some unspecified privileged material somewhere in the report — does nothing to change the waiver argument.

Second, the department needs to determine that the privilege is not being used to conceal evidence of wrongdoing or criminal conduct.

So imagine, now, the position of the Justice Department official tasked with checking this box. On the one hand, the attorney general has declared that the conduct that McGahn detailed was not criminal. The problem is that the attorney general's judgment is wrong; in fact, it is not even credible, and Mueller does not share it. Will a reviewing official be willing to put his or her law license on the line in reliance on the attorney general's scarcely defensible position? That's going to be quite a dilemma for someone.

Unfortunately, as in the score of investigative issues on Congress's plate, the strength of Congress's legal position is counterbalanced by the weakness in its practical position: in a word, time. If recent precedent is any guide, the president may well be able to tie up the issue of McGahn's testimony in the courts until the 2020 election and beyond.

In the administration's dishonorable campaign to keep the American people in the dark about the president's conduct, time is its strongest ally.

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